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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court
Appellate Case No. 2021-000729

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge
Trial Case No.: 2014-CP-26-07617

Opinion No. 2021-UP-167
(S.C. Ct. App. filed May 12, 2021)

Captain's Harbour and Racquet Club
Homeowners Association, Inc. . . . . Respondent

v.

Jerald W. Jones . . . . . Petitioner

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S REPLY TO APPELLANT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

The Appellant/Petitioner, Jerald W. Jones ("Mr. Jones"), submits this Reply to Respondent, Captain's Harbour and Racquet Club Homeowners Association, Inc. ("the Association")'s Return to Petition for a Writ of Certiorari.

REPLY TO THE ASSOCIATION'S COUNTER-STATEMENT OF CASE

Mr. Jones set out the facts in the Appellant's Final Brief and Final Reply Brief as well as in his Petition for a Writ of Certiorari. Mr. Jones now addresses specific alleged facts raised by the Association in its Counter-Statement of Facts.

Contrary to the Association's Counter-Statement, Mr. Jones did not reside at Captain's Harbour condominiums, although he owned a unit there. Mr. Jones provided his condominium unit as the Association management office. He was president of the Association's Board of Directors, but he did not sign the ACE HOA Property Management Agreement (PMA) ("the Management Agreement") in his capacity as president for the Association Board; rather, he signed it in his capacity as the sole member and managing agent of ACE Management.

The Association asserts that Mr. Jones drafted the Management Agreement. Mr. Jones asserts that it was the Association that drafted and prepared the Management Agreement [R., p. 65, ll. 22-25; J.A., p. 66[1]].

With respect to the incident which led to the need for indemnification, the Association wants this Court to infer that Mr. Jones was grossly negligent or willful in

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[1] Mr. Jones' Petition for a Writ of Certiorari makes reference to pages in the Record on Appeal ("R. __") and the Association's Return refers to pages by the Joint Appendix number ("J.A. __"); to avoid confusion, both identifying page numbers appear in this Reply.

causing the altercation resulting in Mr. Jones seeking medical treatment and hiring an attorney to represent him. The undisputed facts are that Mr. Jones was criminally charged because of the statement of a witness, and that the video provided by Mr. Jones was the basis for the criminal charges being placed against the other actors to the altercation [R. 48; J.A. 49]. The criminal charges against Mr. Jones were completely dismissed [R., 64-65; J.A. 70].

Mr. Jones, as the sole managing agent and employee of ACE Management, did not need additional approval or authority from the Board of the Association to write checks to cover his medical expenses and attorney's fees. The purpose of this instant appeal is to establish that Mr. Jones, as the sole managing agent for ACE Management, was covered by the indemnity provisions of the Management Agreement.

The Association has raised material facts that are in dispute that need to be decided in the trial court, which alone should have resulted in a denial of the Association's Motion for Summary Judgment.

ARGUMENT

I. This Court Should Not Refuse to Grant the Petition for Writ of Certiorari Because of a Technical Misstep of Rule 242(c), SCACR.

The Petition for Writ of Certiorari was timely filed with the Supreme Court. Counsel for Mr. Jones acknowledges that inadvertently, the Petition for a Writ of Certiorari was not simultaneously filed with the Court of Appeals. The Court's current COVID-19 procedure of electronic filing makes the process more confusing in that counsel believed electronically filing with the Supreme Court fulfilled the requirement of service to the Court of Appeals.

Having found no reported cases on this issue, counsel would analogize this situation to technical errors with notices of appeal generally. "Clerical errors in a notice of appeal do not destroy the appeal." Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 471, 478, 458 S.E.2d 431, 435 (Ct. App. 1995). The focus should be on whether the Respondent suffered any prejudice. See, e.g. Moody v. Dickinson, 54 S.C. 526, 534, 32 S.E. 563, 566 (1899) (finding that there was no "error in allowing the defendant to correct a mere clerical error in the title of his notice of intention to appeal, whereby it is not even claimed that plaintiffs were misled or in any way prejudiced, and were not delayed" where the error was an improper listing of the parties to the appeal in the notice); Weatherford v. Price, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000) (discussing that the moving party "demonstrates no prejudice as a result of the omission" from the notice of appeal); Charleston Lumber, 318 S.C. at 478, 458 S.E.3d at 436 ("Charleston Lumber's effort to take advantage of a mere clerical error by which they were in no way prejudiced or misled is rejected.").

This error should be treated as a clerical error. In Conner v. City of Forest Acres, 348 S.C. 454, 460-61, 560 S.E.2d 606, 609 (2002), the Supreme Court recognized that failure to properly name respondents in a Notice of Appeal could be a clerical error if the error was rectified promptly and prejudice did not occur. In Conner, the appellant filed a Notice of Appeal on January 12, 1998, naming only one of three defendants as a respondent. *Id.* at 460, 560 S.E.2d at 609. The Court of Appeals advised the appellant on January 14, 1998, that the caption should read differently and identify the additional two defendants as defendants if not respondents. *Id.* Despite such notice from the Court of Appeals, the appellant did not file an Amended Notice of Appeal until after the appellant's initial brief and designation of matter were filed in late May 1998 - almost five months after the Notice of Appeal was originally filed.

Id. at 461,560 S.E.2d at 609. Under these facts and relying on Moody, the Court of Appeals found that the correction did not occur "soon" after the mistake was discovered and that the failure to take action promptly "misled [the two defendants] into believing they were not part of this appeal by the almost five-month delay in amending the Notice, and therefore, they clearly were prejudiced by the amendment." *Id.* at 462, 560 S.E.2d at 610.

This case is clearly distinguishable from Conner, and indeed, the contours of Conner would classify the deficiency in this matter as a clerical error. Unlike in Conner, this instant appeal is in its earliest stage, as no briefs have been filed, other than those relative to this Petition. The record shows that the Court of Appeals received notice of the filing on July 13, 2021 through the South Carolina Supreme Court Clerk. Petitioner's counsel immediately filed a copy of the Writ with the Court of Appeals as soon as the error was discovered. The Respondent has not been prejudiced by this clerical error.

The Respondent correctly points out that he was not served at his email address on file with the South Carolina Attorney Information System (AIS). Appellant's counsel inadvertently served Mr. Mackelcan at an email address that he had used for many years ("dmackelcan@carlockcopeland.com") and for the majority of the time this case has been in litigation. While Respondent had sent emails from his new email address ("dmackelcan@cskl.law"), and Petitioner's counsel had replied to those emails at the new address, the Petitioner's counsel was never formally notified that Mr. MacKelcan had a new email address (and, in fact, of the new name of his firm and his new telephone number). Mr. Leiter's paralegal was not aware that a change in email (and firm name and phone number) had even occurred, and served the Petition for Writ on the same email address she had always used.

The Petition for Writ of Certiorari was timely filed and served. The Appellants erred in not including the Respondent's counsel's current email address; nevertheless, counsel stated in his Return that he does still utilize that older email address and acknowledged receipt of the filing.

This Court should allow Mr. Jones's Petition for Writ of Certiorari to proceed for a ruling on the merits.

II. The Two-issue Rule Does Not Apply to This Appeal.[2]

The Association is misapplying the two-issue rule in this case. The Association argues that Mr. Jones had not asserted, in the proceedings below, that he was acting within the scope of his employment with ACE Management when he incurred the medical and legal fees and expenses. The opposite of this statement is true. Mr. Jones has consistently held that he was acting within the scope of his employment. Although the Association may want to contend that Mr. Jones was acting outside the scope of his employment, Mr. Jones has shown otherwise. This issue was fully argued before the Honorable R. Lawton McIntosh, who heard the parties' motion for summary judgment and issued the Order Granting the Association's motion [R. 64; J.A. 65; R., 74-78; J.A. 75-79]. Moreover, in paragraph 7 of the Association's Complaint, the Association alleges that the defendant was acting outside the scope of his duties as president of the Board of the Association and as agent of the property management company [R. 15; J.A. 16]. This

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[2] The Association is raising the two-issue rule, for the first time, in its Return to the Petition for Writ of Certiorari. It did not raise this issue at any time before the Court of Appeals.

paragraph was expressly denied by Mr. Jones in paragraph 8 of his Answer [R. 18; J.A. 19].

Additionally, in his formal Order [R., 10-13; J.A. 11-14]. Judge McIntosh did not find that Mr. Jones was acting outside of the scope of his employment. Judge McIntosh ruled that the indemnification provisions of the Management Agreement did not apply to Mr. Jones simply because he was not a named party to it. Had Judge McIntosh found that Mr. Jones was acting outside of the scope of his employment, he would have so stated that in his Final Order. Judge McIntosh's ruling was premised on the wording of the Management Agreement, not whether Mr. Jones was acting within or without the scope of his authority.

The Form 4 Order [R. 6; J.A. 7] referred to by the Association simply states that Mr. Jones was not entitled to indemnification for personal charges, being his medical expenses and attorney's fees. This is not a ruling that Mr. Jones was acting outside of the scope of his employment.

Should this Court adopt the reasoning of United States Fidelity & Guaranty Co. v. Housing Authority of the City of Poplar Bluff, ("USF&G") 114 F.3d 693 (8th Cir., 1997), then this matter would be remanded to the trial court for further inquiry and not that Mr. Jones' claim for indemnification is barred as a matter of law.

III. Mr. Jones Properly Raised the Issue of His Status as a Third-party Beneficiary in the Courts Below.

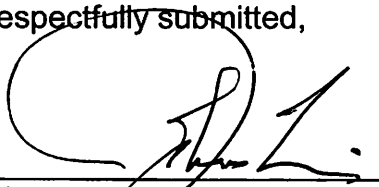
For the reasons stated in Mr. Jones's Final Brief at pages 8-9, the issue of Mr. Jones being a third-party beneficiary was sufficiently raised in order to preserve it for consideration by this Court.

CONCLUSION

USF&G provides practical guidance in how to approach the indemnity issues raised by this appeal. Companies can only act through their agents and Mr. Jones, as the sole member and managing agent of ACE Management, has the right to establish that he was covered by the indemnity provisions in the Management Agreement. The indemnity language in USF&G did not have to state that it covered the agents and employees of the corporation for it, in fact, to cover the employee. The same logic should be applied to this appeal. Mr. Jones is covered by the indemnity language of the Management Agreement.

For the reasons set forth above, Petitioner Jerald W. Jones respectfully asks this Honorable Court to grant the Writ for Petition for a Writ of Certiorari.

Respectfully submitted,



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